



IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1978

No. 78-1911

ROB'T L. GUYLER CO.
In Its Own Behalf and On Behalf of
THE McCARTY CORPORATION,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On
Petition For Writ Of Certiorari
To The United States Court Of Claims

PETITIONER'S REPLY BRIEF TO THE
BRIEF FOR THE UNITED STATES
IN OPPOSITION

William D. Bryce
Attorney at Law
709 Brown Building
Austin, Texas 78701
Attorney for Petitioner

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OPINIONS BELOW

The United States correctly reported the opinions below.

JURISDICTION

The United States has correctly stated the jurisdictional facts.

QUESTIONS PRESENTED

The statement of the questions presented in the Government's brief does not sufficiently present the questions. A correct statement of the questions presented is found in Petitioner's Petition, pages 2 and 3.

STATEMENT

The Government's statement in its brief that "Thereafter, the IFB was amended by the addition of two subparagraphs to provide that the contractor would furnish the dishwashers and by the corresponding deletion of two provisions that had obligated the government to supply the dishwashers" suggests that the provisions were substituted one for the other. This is not the case. The Government is referring to random provisions in isolated and disparate parts of the IFB which were not integrated with one another and of which no notice was provided to bidders (Gov. Brief, 2).

On page 3 of its brief, the Government states that "McCarty did read the amendment but did not recognize the added requirement that the contractor rather than the government would provide the dishwashers". It is Petitioner's position that there is no such requirement and that Mr. McCarty

was not required to recognize something which did not exist.

ARGUMENT

1. The Government makes this untrue statement: "Petitioner's principal argument is that the IFB was ambiguous on the responsibility of the contractor to furnish the specified dishwashers and that this ambiguity should be construed against the government as the drafter of the IFB and should entitle petitioner to an equitable adjustment for the costs incurred in supplying the dishwashers." (Gov. Brief, 3-4). At no place in Petitioner's brief will there be found an argument relying upon ambiguity. The Government has simply announced an argument which it believes it can answer and has assigned that argument to the Petitioner. This fact reflects a serious misapprehension of Petitioner's argument by the Government and may explain the Government's failure to answer the arguments raised by Petitioner in its brief.¹

In truth, the Government did not acknowledge nor did it make a single word of reply to Petitioner's principal argument, which is that "The

¹ Petitioner's only reference to "ambiguity" in Petitioner's application is in a negative sense, as follows: "The cases cited by the Board of Contract Appeals and the Court of Claims do not apply, because those cases involve ambiguities or conflicts between two or more otherwise valid contract requirements. In this case, there exists not even one contractual requirement to furnish dishwashers, much less two or more." (Pet. App. 218) (Emphasis added). Thus, Petitioner in its brief has explicitly disaffirmed any reliance upon any argument based on ambiguity.

decision of the United States Court of Claims denying Petitioner the benefit of a Federal Statute is void as a matter of logic and as a matter of law" (Pet. App. 7). Why did the Government refuse to acknowledge this argument? Why did the Government not reply to this argument? Surely if the Government can refute a simple point of logic it will do so; but the Government failed to address this issue, and remained totally silent regarding it. Having failed to meet the point, such should be deemed to have been conceded by the Government.

2. The Government next failed to acknowledge or overcome Petitioner's argument that "the United States Court of Claims invaded the province of the Congress by creating and imposing three conditions for relief under Section 2305(b), Title 10, United States Code. This violates Article One, Section One of the United States Constitution which vests 'all legislative Power' in the Congress" (Pet. App. 8-10). This case presents a direct violation of the Constitution of the United States by the United States Court of Claims. The Government's brief is strangely silent on this argument and does not even show it as an argument made by the Petitioner in this case. The Government is totally silent on this point, presents no cases for the court's review, presents no arguments for the court's review, and refuses to meet the argument or to recognize it in any way. Petitioner's constitutional argument therefore stands unchallenged, unmet, and unanswered.

3. The Government failed to meet or deal with Petitioner's argument that the specifications in the invitation for bids "do not contain the necessary language and are not sufficiently descriptive in language to permit full and free competition between

bidders as required by Article 2305(b), Title 10, United States Code." (Pet. App. 10-11). As a matter of law, the language used in the invitation for bids fails to measure up to the statute, and the statute clearly says that in those circumstances "the invitation is invalid and no award may be made". (Pet. App. 4). Instead of answering this argument, the Government reasserts the false position that this Petitioner is arguing "ambiguity". The Petitioner is not arguing ambiguity, and the Petitioner did not argue that term in the United States Court of Claims, and the Petitioner has nowhere in its appeal based an argument upon ambiguity. The Government has refused to recognize this, and the Government has falsely claimed that the Petitioner has based its argument upon ambiguity. This is not true.

4. Finally, the Government does not meet any of the arguments raised by the Petitioner pertaining to violation of the Armed Services Procurement Regulations by the Government, nor does it address any of the nine (9) familiar principles of contract law long recognized and applied in federal contract cases (Pet. App. 11-18). The Government waives all these aside with this statement: "...[T]he only issue is whether respondent [sic] is entitled to compensation from the government (in the form of an equitable adjustment) because of an asserted ambiguity on the basic question of which party was to furnish the dishwashers." (Gov. Brief, 5). Once again, the Government has returned to its false assertion that Petitioner's arguments are grounded upon "ambiguity".

Since the Government has failed to show that it fulfilled its mandatory compliance with nine

(9) Armed Services Procurement Regulations, and since the Government has failed to defend its violation of nine (9) well known principles of contract law, these points must be taken as having been unmet and unanswered by the Government.

The Government asserts that "This case does not present a question concerning the adequacy of compliance with the terms of a contract" (Gov. Brief, 5). A proper invitation for bids is the Government's part of the contract, a proper bid is the bidder's part. Together, these documents form the contract. The Government failed to fulfill its contractual requirement to provide a proper invitation for bids, as shown in Petitioner's brief, pages 10-18.

CONCLUSION

Since the Government has failed to overcome Petitioner's arguments, and has instead asserted that Petitioner is arguing "ambiguity" when Petitioner is not making that argument, the Government's brief is thus grounded upon a false premise and fails to answer the issues raised by the Petitioner in this case. A Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

William D. Bryce
Attorney for Petitioner
709 Brown Building
Austin, Texas 78701
512/476-7533